

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN FREMPONG-ATUAHENE, et al. : CIVIL ACTION
:
v. :
:
CITY OF PHILADELPHIA, et al. : NO. 99-1359

MEMORANDUM AND ORDER

HUTTON, J.

October 28, 1999

Presently before the Court are Defendants' Motion to Dismiss Plaintiff's Revised Amended Complaint Pursuant to F.R.C.P. 12(b)(6) (Docket No. 15) and Plaintiff's response thereto (Docket No. 20). For the reasons stated below, Defendants' Motion is GRANTED.

I. BACKGROUND

On April 4, 1999, Stephen Frempong-Atuahene ("Plaintiff")¹ filed pro se the instant Revised Amended Complaint (Docket No. 14) against the City of Philadelphia (the "City"), the City's Licenses and Inspection Department ("L&I"), Robert Solvibile ("Solvibile"), individually and as an officer of L&I, and John and Jane Does, employees of the City and L&I (collectively, the "Defendants"). Plaintiff brings seven claims: Count 1, Trespass under Pennsylvania law; Count 2, "Civil Rights Under 42 U.S.C. § 1983;" Count 3, "§ 1983 Equal Protection and Racial Discrimination;" Count

¹/ Plaintiff is proceeding pro se.

4, "§ 1983 Retaliatory Motive;" Count 5, "42 U.S.C. § 1985 Conspiracy to Interfere with Plaintiff's Civil Rights;" Count 6, "Violation of Constitutional Rights;" and Count 7, "De Facto or Inverse Condemnation." (Rev. Amend. Compl.). Plaintiff seeks money damages.

Plaintiff alleges that in 1993 he and Solvibile had a confrontation in which Solvibile allegedly used racial and ethnic slurs and epithets. (Pl.'s Mem. of Law in Supp. of Pl.'s Answer to Def.s' Mot. to Dismiss Pl.'s Civil Action Compl. at 1). Plaintiff also alleges that Solvibile threatened to "demolish and/or confiscate" properties in which Plaintiff had an interest. (Pl.'s Mem. of Law in Supp. of Pl.'s Answer to Def.s' Mot. to Dismiss Pl.'s Civil Action Compl. at 1). Thereafter, numerous properties owned by Plaintiff were demolished, allegedly without any legal justification. (Pl.'s Mem. of Law in Supp. of Pl.'s Answer to Def.s' Mot. to Dismiss Pl.'s Civil Action Compl. at 1). Plaintiff alleges that he did not receive pre-deprivation notice that his properties were to be demolished by the City. (See, e.g., Pl.'s Rev. Amend. Compl ¶ 10). Plaintiff alleges that Solvibile, through the exercise of his authority as a City employee working in L&I, and in conspiratorial concert with others, "waged, unrelentlessly, a racial war against" Plaintiff and his family. (Pl.'s Rev. Amend.

Compl at 3). On these grounds, Plaintiff brings the instant action seeking the relief heretofore enumerated.\²

II. DISCUSSION

A. Legal Standard

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),\³ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S. Ct, 2893, 2906 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50,

²/ Notably, Plaintiff does not state or allege that he previously sought any relief under Pennsylvania law for the damages he suffered as a result of not receiving pre-deprivation notice that his properties were to be demolished.

³/ Rule 12(b)(6) provides that:

Every defense in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .
.(6) failure to state a claim upon which relief can be granted. . . .

Fed. R. Civ. P. 12(b)(6).

109 S. Ct. at 2906 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 104 S. Ct. 2229, 2232 (1984)). Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

B. Plaintiff's Claims of constitutional Violations
Under 42 U.S.C. § 1983

Section 1983 of Title 42 of the United States Code provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (West 1999). While § 1983 is not itself a source of substantive rights, Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694-95 n.3 (1979), the section provides a remedy for violations of constitutional rights where the alleged violation was committed by a person acting under the color of state law. Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995).

The Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits takings without just compensation. U.S. Const. amend. V. Logically, a taking does not violate a constitutional right unless just compensation is denied. The character of the constitutional right therefore compels a property owner to utilize procedures for obtaining compensation commensurate with the taking. Thus, the Fifth Amendment's due process requirement also is relevant to takings.

Due process requires that a taking not be effected unless legal prerequisites are established and strictly followed. Namely, due process requires that a deprivation of property be preceded by notice and hearing appropriate to the nature of the case. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985).

The takings power in Pennsylvania, although arising from the Commonwealth Constitution, is governed statutorily by the Eminent Domain Code (the "Code"). 26 Pa. Cons. Stat. Ann. § 1-101 et seq. (West 1999). The Code requires, inter alia, that notice of the taking be provided to the landowner, 26 Pa. Cons. Stat. Ann. § 1-405 (West 1999), and that preliminary objection be heard upon motion to the court, 26 Pa. Cons. Stat. Ann. § 1-406 (West 1999), thereby providing a mechanism for a property owner to prevent the contemplated taking. The Code also allows a landowner to secure

post-deprivation compensation from the Commonwealth. 26 Pa. Cons. Stat. Ann. § 1-407 (West 1999).

In the context of a taking under state law, a § 1983 action cannot lie unless a landowner exhausted the appropriate, available state remedies. Edelweiss Dev. Corp. v. County of Susquehanna, 738 F. Supp. 879, 883 (M.D. Pa. 1988). See also Marietta Realty Inc. v. Springfield Redevelopment Auth., 902 F. Supp. 310, 313 (D. Mass. 1995) (stating that [w]here a claimant seeks a post-deprivation remedy and the laws of that state provide an adequate one, the [claimant] cannot bring a § 1983 action without first exhausting the laws of the state."). The Edelweiss court explained that because the Fifth Amendment prohibits takings without just compensation, a constitutional violation actionable under § 1983 is not cognizable until just compensation is denied. Edelweiss, 738 F. Supp. at 883. The court reasoned as follows:

The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a [§] 1983 action. If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until [he or she] has used the procedure and . . . [been] denied just compensation. . . .

Id., 883-84 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1984)). See also Baranowski v. Borough of Palmyra, 868 F. Supp. 86, 89 (M.D. Pa. 1994) (granting defendants' dismissal motion on § 1983 claim

because plaintiffs failed to seek just compensation under Pennsylvania's Eminent Domain Code).

Plaintiff's second, third, fourth, sixth, and seventh claims allege violations of § 1983. The common theme underlying each claim is that Plaintiff was not afforded pre-deprivation notice of the alleged de facto taking of his property and that such deprivation violated his 5th Amendment and 14th Amendment rights. Defendants argue that Plaintiff's claims should be denied pursuant to Rule 12(b)(6) for failure to state a claim. Defendants expressly argue that Plaintiff's Amended Complaint fails to state any specific, factual allegations from which this Court can determine that post-deprivation remedies are inadequate. Nevertheless, the Court does not consider Defendants' arguments for dismissal under Rule 12(b)(6) because Plaintiff's § 1983 claims may not be ripe for adjudication.

The facts of this case, as stated in Plaintiff's Revised Amended Complaint do not indicate whether Plaintiff exhausted all or, indeed, pursued any state remedies before filing the instant Motion. Nevertheless, the ripeness issue directly relates to the Court's jurisdiction over these claims. Therefore, the Court is compelled to consider whether Plaintiff's § 1983 claims are ripe for adjudication.

The Supreme Court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1984),

stated that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until [he] has used the procedure and been denied compensation." Id. at 195, 105 S. Ct. at 3121. Cognizant that § 1983 does not create any substantive rights but merely serves as a vehicle by which a citizen (e.g., a landowner in a takings case) may challenge the conduct of a state actor who has allegedly deprived the citizen of his or her civil rights, the Court notes that the nature of Plaintiff's constitutional right in this takings case brought pursuant to § 1983 first requires Plaintiff to utilize the state procedures available to him before filing a § 1983 action. Id. at 195 n.13, 105 S. Ct. 3121 n.13. Therefore, Plaintiff's § 1983 claims are premature because it is not apparent to this Court that Plaintiff previously sought relief under the Code. Because Plaintiff did not seek relief under the Code, this Court, pursuant to Fed. R. Civ. P. 12(b)(1), does not have jurisdiction over Plaintiff's claims. Accordingly, the Court dismisses Plaintiff's second, third, fourth, sixth, and seventh claims.

C. Plaintiff's 42 U.S.C. § 1985(3) Claim

Section 1985(3) of Title 42 of the United States Code states as follows:

If two or more persons in any State or Territory conspire
... for the purpose of depriving, either directly
or indirectly, any person or class of persons of the

equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, **whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States**, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 1985(3) (West 1999) (emphasis added). To maintain a claim under § 1985(3), a plaintiff must establish:

(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons ... [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682, 685 (3d Cir.1997).

Plaintiff's fifth cause of action alleges a violation of § 1985(3). If the Court allows Plaintiff's § 1985(3) claim to stand, the Court ultimately must determine whether there was a taking without just compensation. That is, Plaintiff's § 1985(3) claim cannot withstand a Rule 12(b)(6) challenge unless his Revised Amended Complaint states facts sufficient to show that he sustained an injury to his property or a deprivation of any right or privilege enjoyed by citizens of the United States. Because the injury Plaintiff allegedly suffered was an unlawful taking, the

Court cannot consider this cause of action without deciding the case's ultimate issue. If the Court ruled upon Plaintiff's § 1985(3) claim, such ruling thereby would allow Plaintiff to circumvent the ripeness requirements established by the Supreme Court for takings cases. Accordingly, Plaintiff's claim for conspiracy under § 1985(3) (Count V) is dismissed.\⁴

D. Claim for Trespass Under Pennsylvania Law

Along with his federal civil rights claims, Plaintiff states a claim for trespass under Pennsylvania law (Count 1). In United Mine Workers v. Gibbs, 383 U.S. 715, 722, 86 S. Ct. 1130, 1138 (1966), the Supreme Court stated that federal courts have the power to entertain pendent state claims if the federal and state claims "derive from a common nucleus of operative facts" such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." The Court also observed, however, that "[c]ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state

^{4/} In the alternative, Count V asserts a claim against Defendants under § 1985(3) for allegedly conspiring to deprive Plaintiff of his constitutional rights. To sustain this cause of action, Plaintiff must prove the existence of a conspiracy among "two or more persons." Plaintiff, however, failed to allege such a conspiracy. A governmental organization cannot, as a matter of law, conspire with its own agents or employees since they are considered a single legal entity. Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505, 509-10 (6th Cir. 1991); Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1371 (4th Cir. 1989), cert. denied, 493 U.S. 850, 110 S. Ct. 147 (1989). Accordingly, because each of the Defendants named by Plaintiff is an employee of the City of Philadelphia, the City and its employees share an agency relationship and therefore cannot conspire with each other as a matter of law. Thus, Plaintiff's Count V must be dismissed.

claims should be dismissed as well." Id. at 726, 86 S. Ct. at 1139.

Because each of Plaintiff's federal claims is dismissed, this Court, pursuant to 28 U.S.C. S 1367(c)(3),⁵ declines to exercise jurisdiction over Plaintiff's remaining state claim of trespass against Defendants.

An appropriate Order follows.

⁵/ Title 28, Section 1367(c) provides that:
The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-
(1) the claim raises a novel or complex issue of State law,
(2) the claims substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C.A. § 1367(c) (West 1999).

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O R D E R

AND NOW, this 28th day of October, 1999, upon consideration of Defendants' Motion to Dismiss Plaintiff's Revised Amended Complaint Pursuant to F.R.C.P. 12(b)(6) (Docket No. 15) and Plaintiff's response thereto (Docket No. 20) IT IS HEREBY ORDERED that:

1) Plaintiff's Count 2 ("Civil Rights Under 42 U.S.C. § 1983"), Count 3 ("§ 1983 Equal Protection and Racial Discrimination"), Count 4 ("§ 1983 Retaliatory Motive"), Count 6, ("Violation of Constitutional Rights"), and Count 7 ("De Facto or Inverse Condemnation") are **DISMISSED without prejudice;**⁶

2) Count 5 ("42 U.S.C. § 1985 Conspiracy to Interfere with Plaintiff's Civil Rights") is **DISMISSED without prejudice;** and

^{6/} Of course, Plaintiff is not foreclosed from seeking relief under the Pennsylvania Eminent Domain Code, 26 Pa. Cons. Stat. Ann., 1-101 et seq. (West 1999). Depending on the result of an adjudication under the Eminent Domain Code, if Plaintiff chooses to pursue such relief, Plaintiff's constitutional claims then may be ripe for consideration in federal court.

3) Count 1 (Trespass under Pennsylvania law) is **DISMISSED**
without prejudice.

BY THE COURT:

HERBERT J. HUTTON, J.